APR 20 1981
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SUPREME COURT, U.S.

IN THE

UNITED STATES SUPREME COURT

STATE OF MISSOURI Petitioner	)	
v.	)	No. 80-1393
WILLIE TUNSTALL, et al. Respondents	)	

APPLICATION FOR LEAVE TO PROCEED AS A POOR PERSON

Comes now Mary K. Wefelmeyer, on behalf of Respondent, Willie Tunstall, and informs the Court that the Respondent was found to be an indigent at the time he was arraigned on the charges which lead to the conviction which is the subject of the Petition for Writ of Certiorari. The trial court granted him leave to appeal as a poor person in the Missouri courts. He does not have the funds or the financial resources to secure the cost or pay the fees and expenses associated with this petition.

WHEREFORE, he respectfully prays that the Court grant him leave to proceed as a poor person.

Respectfully submitted,

Mary K. Wefelmeyer

MARY K. WEFELMEYER
Attorney for Respondent

Subscribed and sworn to before me this 17 day of April, 1981.

Barbara J. Ingenthron

Notary Public

My commission expires: 9/27/84

AFFIDAVIT OF SERVICE

STATE OF MISSOURI)
)
Petitioner)
)
v.) No. 80-1393
)
WILLIE TUNSTALL, et al.)
)
Respondents)

Mary K. Wefelmeyer, Assistant Public Defender, upon oath states that on April 17, 1981, she served copies of the Suggestions in Opposition to Petition for Certiorari in the above-entitled cause to the Attorney General's Office, State of Missouri, Supreme Court Building, Jefferson City, Mo. 65102, Respondent.

That service to the Attorney General's Office was made by mailing three copies, postage prepaid, to the above address.

That a copy was served upon the Clerk of the Supreme Court of the United States, United States Courthouse, Washington, D.C. 20543.

Mary K. Wefelmeyer

MARY K. WEFELMEYER
Attorney-at-Law
Missouri Bar No. 27345
Public Defender's Office
Municipal Courts Building
1320 Market St.
St. Louis, Mo. 63103

Subscribed and sworn to before me this 17 day of April, 1981.

Barbara J. Ingenthron

Notary Public

My commission expires: 9/27/81

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1981

NO. 80-1393

STATE OF MISSOURI

Petitioner

v.

WILLIE TUNSTALL

Respondent

SUGGESTIONS IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

Mary K. Wefelmeyer
Attorney-at-Law
Missouri Bar No. 27345
Public Defender's Office
Municipal Courts Building
1320 Market St.
St. Louis, Mo. 63103

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Coleman v. Alabama, 399 U.S. 1 (1970).

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O'Brien v. Skinner, 414 U.S. 524 (1973).

Sours v. State, 593 S.W. 2d 208 (Mo. en banc 1980); vacated and remanded, 445 U.S. ____, 64 L.Ed. 2d 820, affirmed after remand, 603 S.W. 2d 592 (Mo. en banc 1980), cert. denied, ____U.S.____, No. 80-571 (January 26, 1980).

State v. Crews, No. 41073 (Mo. App. April 29, 1980).

United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980).

United States v. Simpson, 435 U.S. 6 (1978).

United States v. Thirty-Seven (37) Photographs, 402 U.S. 363; reh. den. 403 U.S. 924 (1971).

Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W. 2d 794 (1979).

Whalen v. United States, ____U.S.____, 63 L.Ed. 2d 715 (1980).

Zacchini v. Scripp-Howard Broadcasting Co., 433 U.S. 562, 53 L.Ed. 2d 965 (1977).

STATUTES CITED

Rule 21, Rules of the Supreme Court.

§559.225 R.S.Mo. (Supp. 1976).

§560.120 R.S.Mo. (1969).

§560.135 R.S.Mo. (Supp. 1975).

Number 80-1393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI,

Petitioner,

Vs.

WILLIE TUNSTALL, ET AL.,

Respondents.

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

The Respondent, Willie Tunstall, in opposition to the granting of the Petition for Writ of Certiorari in this case, states as follows:

QUESTIONS PRESENTED

1. Whether the Writ of Certiorari should not issue because Petitioner has not established the source of this Court's jurisdiction, the threshold inquiry appropriate to the disposition of this case.

2. Whether the Writ of Certiorari should not issue because the decision issued by the Supreme Court of Missouri refusing to transfer the decision of the Missouri Court of Appeals was based upon the authority of Sours v. State, 593 S.W. 2d 208 (Mo. en banc 1980); vacated and remanded, 445 U.S. ____, 64 L.Ed. 2d 820, affirmed after remand, 603 S.W. 2d 592 (Mo. en banc 1980), cert. denied, ____U.S.____, No. 80-571 (January 26, 1981), which moots the issue raised herein.

REASONS FOR DENYING THE WRIT

I

THE WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE PETITIONER HAS NOT ESTABLISHED THE SOURCE OF THIS COURT'S JURISDICTION AS REQUIRED BY RULE 21.1(e) OF THE RULES OF THE SUPREME COURT.

The State of Missouri, Petitioner herein, has filed its Petition for Certiorari which does not set out, as required by the Rules of the Supreme Court, the source of this Court's jurisdiction.

Rule 21 of the Rules of the Supreme Court provides in pertinent part:

> 1. The Petition for Writ of Certiorari shall contain in the order here indicated:
>
> (e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:
>
> (i) The date of the judgment or decree sought to be reviewed, and the time of its entry;
>
> (ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and
>
> (iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed;
>
> (iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.
>
> * * *
>
> 5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition. (Emphasis supplied).

The threshold inquiry necessary to the disposition of every case that comes before the Supreme Court is the source of this Court's jurisdiction. See Brown Shoe Co. v. United States, 370 U.S. 294, 305-06 (1962).

This principle is embodied in this Court's rules and reflects the necessity for the proper presentation of matters to this Court in order that it may properly dispose of the vast quantity of matters competing for this Court's time. These rules are obviously necessary, and having been established, must not be ignored.

This Court, in Furness, Withy, and Co. v. Yang-Tsze Ins. Assn., 242 U.S. 430 (1917), noted that petitions to the Supreme Court are at the risk of the party making them and then stated:

> Unless these (petitions) are carefully prepared, contain appropriate references to the record and present with studied accuracy, brevity, and clearness whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the Court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket. (Emphasis in original).

Id. at 434.

Furthermore, this Court stated in Green v. Elbert, 137 U.S. 615 (1891):

> To the proper conduct of the business of this Court rules are necessary, and, having been prescribed, reasonable compliance with this is expected and must be insisted upon. When they are disregarded, dispensation from the consequences can only be extended where the circumstances furnish adequate excuse. Were this otherwise, our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired. (Emphasis supplied).

Id. at 621.

This Court dismissed the writ of error in Green v. Elbert, supra, stating that:

> (w)ere carelessness in the inception may have finally resulted in forgetfulness (in not filing the docket fee); but we cannot, therefore absolve him from the penalty legitimately attaching to this disregard of our rules. (Emphasis supplied).

Id. at 623.

Petitioner has disregarded this Court's rules and would have this Court, already over-burdened, glean from its Petition for Certiorari the source of the jurisdiction of the Supreme Court. This Court has provided, by case law and its own rules, that it

will not countenance such disregard for its rules, and should not countenance such disregard here.

II

THE WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THE ISSUE RAISED BY PETITIONER IS IDENTICAL IN ALL RESPECTS TO THE ISSUE PRESENTED IN SOURS V. STATE, THE FINAL DISPOSITION OF WHICH MOOTS THE ISSUE PRESENTED HEREIN.

The issue raised before this Court as a result of the decision of the Missouri Supreme Court in Sours v. State, 593 S.W. 2d 208 (Mo. en banc 1980) (Sours I) was based on convictions for the crimes of robbery first degree by means of a dangerous and deadly weapon, §560.120, R.S.Mo. 1969 and §560.135, R.S.Mo. Supp. 1975, and armed criminal action, §559.225, R.S.Mo. Supp. 1976, the identical statutes under which Respondent here was convicted.

This Court vacated the decision of the Missouri Supreme Court and remanded the case for reconsideration in the light of Whalen v. United States, ____U.S.____, 63 L.Ed. 2d 715 (1980). Missouri v. Sours, ____U.S.____, 64 L.Ed. 2d 820 (1980).

Upon remand, the Missouri Supreme Court, in Sours v. State, 603 S.W. 2d 592 (Mo. en banc 1980) (Sours II) noted that no opinion of the Supreme Court had considered a statute that contained wording similar to or identical to that found in Missouri's armed criminal action statute. Id. at 593. The Missouri Supreme Court held, based on its construction of Missouri law, that the underlying felony, robbery first degree by means of a dangerous and deadly weapon, was either an included or lesser included offense of armed criminal action. See generally, United States v. Sampol, 636 F.2d 621, 651-55 (D. C. Cir. 1980).

The Missouri Supreme Court has definitively decided, which this Court may not dispute, as follows:

1. It was the intention of the Missouri General Assembly that separate and multiple punishments be imposed for armed criminal

action and the underlying felony.

2. Every element of the underlying felony herein, robbery first degree by means of a dangerous and deadly weapon, is included in Armed Criminal Action, that is, proof of robbery first degree by means of a dangerous and deadly weapon does not require proof of any additional elements not needed to prove Armed Criminal Action; that is, Armed Criminal Action includes the underlying felony and that Armed Criminal Action and robbery first degree are in law and fact the same. e.g., Whalen v. United States, supra, Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973); O'Brien v. Skinner, 414 U.S. 524 (1973); Garner v. Louisiana, 368 U.S. 157 (1961).

This Court denied certiorari with respect to Sours II. Missouri v. Sours, No. 80-571 (January 26, 1981). Petitioner, however, attempts to overlook the effect of the denial of certiorari, and seeks to sustain a breath of life to its arguments by stating that this Court's most recent pronouncement in this matter was presumably because the matter was moot. (Petition for Certiorari, at 9).

The facts belie such an allegation. Only Justices Blackmun and Rehnquist would have dismissed the petition for a writ of certiorari as being moot. None of the remaining members of the Supreme Court would have granted certiorari. Missouri v. Sours, No. 80-571 (49 U.S.L.W. 3531, January 27, 1980). It is thus clear that the decision of the Missouri Supreme Court in Sours I, affirmed in Sours II, is the law of the State of Missouri and that the decision rendered State v. Crews, No. 41073 (Mo. App. April 29, 1980), must stand.

Furthermore, the reliance placed on Brintley v. Michigan, 444 U.S. 948 (1979), by Petitioner and Petitioner's allegations that the decision in Brintley should be controlling because of similarities in the Michigan statutes involved in Brintley and the Missouri statutes ignores the effect of the holding of the Missouri Supreme Court that no Supreme Court decision has considered a statute that contained wording similar or identical to that

found in Missouri's armed criminal statute. Sours v. State, 603 S.W. 2d at 593.

The Michigan Supreme Court, in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W. 2d 794 (1979), held, in essence, that the Michigan felony firearms statute created a separate and distinct crime from the underlying felony so that the two (2) offenses were not the same. This is contrary to the Missouri Supreme Court's holding that, based on state law, the armed criminal action statute and robbery first degree by means of a dangerous and deadly weapon are the same offen e.

The construction of the armed criminal action statute by the Missouri Supreme Court is binding upon this Court because the United States Supreme Court lacks jursidiction to construe state laws. United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, rehearing denied, 403 U.S. 924 (1971); Coleman v. Alabama, 399 U.S. 1 (1970). As was stated in Memorial Hospital v. Maricopa County, supra at 256, "(I)t is not our function to construe a state statute contrary to the construction given it by the highest court of a state. See also, O'Brien v. Skinner, supra.

It is of no import that the Sours court went on to also base its decision on federal constitutional grounds.

> It is undoubtedly "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails is the non-federal ground is independent of the federal ground and adequate to support the judgment. Fox Film Corporation v. Muller, 296 U.S. 207, 210, (80 L.Ed. 158, 159, 56 S.Ct. 183)." Cramp v. Board of Public Instruction, 368 U.S. 278, 281 7 L.Ed. 2d 285, 288, 82 S.Ct. 275.

Jankovich v. Indiana Toll Road Company, 379 U.S. 487 (1965).

In Jankovich, the Indiana Supreme Court invalidated a city ordinance as authorizing an unconstitutional taking without compensation. The decision was based upon both the Indiana constitution and the United States Constitution. This Court held that the ruling was based upon adequate state grounds and therefore dismissed the writ of certiorari as improvidently granted. In the same manner, the writ of certiorari should not issue in

the case at hand.

The Missouri Supreme Court based its decision on adequate, independent state grounds.

> This is not a case . . . where the lower court opinion as a whole "leaves the impression that the court probably felt constrained to rule as it did because of (decisions applying the 14th Amendment)," Minnesota v. National Tea Company, supra, 309 U.S. at 554-555, 84 L.Ed. at 922, or "because it felt under complusion of federal law as enunciated by this Court so to hold," Mississippi ex rel. Southern Railroad Company v. Mayfield, 340 U.S. 1, 5, 95 L.Ed. 3, 8, 71 S.Ct. 1, with the result that the state and federal grounds are "so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law," State Tax Commissioner v. Van Catt, 306 U.S. 511, 514, 83 L.Ed. 950, 952, 29 S.Ct. 605.

Jankovich, supra, at 443.

In order to follow the established practice of avoiding constitutional decisions where possible, United States v. Simpson, 435 U.S. 6 (1978), the writ of certiorari should not issue because the lower court's decision is supported by adequate state grounds. The Supreme Court's power "is to correct wrong judgments, not to revise opinions." Zacchini v. Scripp-Howard Broadcasting Company, 433 U.S. 562, 53 L.Ed. 2d 965, 970 (1977).

Finally, this Court's summary dismissal of Brintley v. Michigan, supra, does not require the granting of the petition for certiorari in this case, as Petitioner suggests. An unexplicated disposition of a lower court's decision settles the case for the parties but does not necessarily determine the validity of the lower court's reasoning as expressed in its opinion. Mandel v. Bradley, 432 U.S. 173 (1977). Brintley, supra, presented the question whether separate convictions and consecutive sentences for both a felony and for felony firearm violate the Michigan and the United States constitutional prohibitions against double jeopardy. The federal constitutional issue was never reached, however, for the case was decided as a matter of Michigan's highest court construing its own statute in light of its own laws. Michigan is entitled to reach a decision different from that reached by Missouri and the principle involved in the two cases remains unchanged -- since the decisions were reached by ruling upon adequate, independent state grounds,

there is no substantial federal question.

This Court's recent decision in Albernaz v. United States, No. 79-1709 (March 9, 1981), does not dictate a contrary result with respect to the issues raised herein. The holding in Albernaz was based on the finding of the Supreme Court that the statutes in question represented two (2) separate offenses. Justices Stewart, Marshall, and Stevens, who joined in the majority opinion in Whalen, supra, concurred in the judgment in Albernaz, supra, stating that a legislature may not provide cumulative sentences for the same crime.

Thus, the result reached by the Missouri Supreme Court in Sours II, remains unchanged by the holding in Albernaz.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

MARY K. WEFELMEYER
Attorney-at-Law
Missouri Bar No. 27345
Municipal Courts Building
1320 Market Street
St. Louis, Mo. 63103

Attorney for Respondent

The Petition for Certiorari

1. The petition for writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

(b) A list of all perties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties. This listing may be done in a footnote.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts of administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5 reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition.

is filed;

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involved, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1 (k) of this Rule.

(g) A concise statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the state in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1 (k) of this Rule.

(i) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17.

(k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree sought to be reviewed and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) Any other appended materials.

If what is required by this paragraph or by subparagraphs 1(f) and (h) of this Rule, to be included in the petition is voluminous, it may, if more convenient, be separately presented.

2. The petition for writ of certiorari shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 46.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as pro-

vided in subparagraph 1 (j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

4. The petition for writ of certiorari shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1 (f) of this Rule, and the appendix.

5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.